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Seventh United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices
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Review of application and implementation of the Set

Assessment of the application and implementation of the Set

Note by the UNCTAD secretariat

Executive summary

This note reviews major developments that have taken place at the national, regional and multilateral levels in the field of competition law and policy, particularly since November 2010, when the Sixth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices was held. The note then reviews in chapter I the operation of the Set in the field of competition law and policy, looking at its main provisions and evaluating the extent to which they have been implemented to date. An evaluation is made of progress in implementation by States members of UNCTAD and by the Intergovernmental Group of Experts on Competition Law and Policy of the resolution adopted by the Sixth Review Conference, drawing attention to technical assistance and UNCTAD voluntary peer reviews. In chapter II, details are provided of developments in international cooperation based on UNCTAD studies conducted for annual meetings of the Intergovernmental Group of Experts since 2010. Finally, in chapter III, the note outlines possible activities in the field of competition and consumer protection policy that the Seventh Review Conference might wish to launch in the next five years.

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Introduction

1. The General Assembly, in its omnibus trade resolution 65/142, paragraph 23, adopted on 20 December 2010, reaffirmed the fundamental role of competition law and policy in sound economic development and took note of the final report of the Sixth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices.[1]

2. The Set was adopted 35 years ago and has since been the only multilateral framework on competition. Competition law and policy continues to attract attention at national, regional and multilateral levels. At the national level, 122 countries, including developing countries and countries with economies in transition, have adopted competition laws.

3. Since the Sixth Review Conference, which was held in November 2010, six developing countries, including three least developed countries, have introduced competition laws. At the regional level, many groupings of States are in the process of implementing regional competition rules. The Competition Commission of the Common Market for Eastern and Southern Africa began implementing its competition regulations and rules on 14 January 2013. The West African Economic and Monetary Union is reforming its regional legal framework on competition, which was adopted in 2002, to achieve a reasonable balance between national and regional enforcement.

4. The International Competition Network, Organization for Economic Cooperation and Development and UNCTAD have been very active in disseminating competition law and policy principles throughout the world, while national competition authorities have responded to these efforts, both bilaterally and though cooperation with these organizations.

5. In the period between the Sixth Review Conference and January 2015, four sessions of the Intergovernmental Group of Experts on Competition Law and Policy, three Ad Hoc Experts Meetings on Consumer Protection and one Ad Hoc Expert Meeting on the Role of Competition Law and Policy in Fostering Sustainable Development and Trade through the Enhancement of Domestic and International Competitiveness of Developing Countries took place at UNCTAD. The fourteenth session of the Intergovernmental Group of Experts, held in July 2014, acted as a preparatory meeting for the Seventh Review Conference.

6. In April 2012, UNCTAD XIII took place in Doha, Qatar. The Conference, which examined development-centred globalization – towards inclusive and sustainable growth and development – considered the role of competition law and policy in this context and agreed in the Doha Manar that the "development of competition policies remains important for fostering a competitive environment and preventing anticompetitive practices" (paragraph 10).

7. The Doha Mandate recognizes that the "objective of competition policy is to create and maintain a competitive environment by eliminating anticompetitive practices", and encourages member States to "consider establishing competition laws and frameworks in coherence with their national development strategies" (paragraph 50). The Mandate states that UNCTAD should "conduct analysis and research and help developing countries and countries with economies in transition to formulate and implement competition and consumer protection policies, promote the sharing of best practices, and carry out peer reviews with regard to the implementation of such policies" (paragraph 56(m)).

[1] TD/RBP/CONF.7/11.

8. It is important to note that competition policy was included among the priorities of UNCTAD in contributing to making globalization more efficient and more equitable. The Set aims to achieve greater efficiency in international trade and development in line with national economic and social policies, and eliminate disadvantages to trade and development, which may result from anticompetitive business practices. It seeks to "protect and promote social welfare... and the interest of consumers". The Set is entitled "Set of Equitable Principles and Rules", in particular because it endorses the principle of "Preferential or Differential Treatment for developing countries" as embodied in Section C.

I. Implementation of the Set

A. Objectives of the Set

9. Objective No. 1 of the Set – "to ensure that restrictive business practices do not impede or negate the realization of benefits that should arise from the liberalization of tariff and non-tariff barriers affecting world trade, particularly those affecting the trade and development of developing countries" – is of particular relevance today, as globalization is rapidly expanding and more and more questions are being raised concerning the effects of economic recession, especially with respect to the relative roles of Governments and markets.

10. With respect to Objective No. 2 – "to attain greater efficiency in international trade and development, particularly that of developing countries, in accordance with national aims of economic and social development and existing economic structures, such as through: (a) The creation, encouragement and protection of competition; (b) Control of the concentration of capital and/or economic power; (c) Encouragement of innovation" – the results have been encouraging. Since the Sixth Review Conference, many developing counties and countries with economies in transition have shown great interest in competition policy and enacted relevant legislation. In this period, eight countries and/or territories adopted new competition laws, namely Afghanistan (2010), Fiji (2010), Ecuador (2011), Bangladesh (2012), Hong Kong, China (2012), Ethiopia (2013), Paraguay (2013) and Brunei Darussalam (2015). Cambodia, the Lao People's Democratic Republic, Myanmar and the Philippines are currently drafting competition laws (see http://www.asean.org/communities/asean-economic-community/category/competition-policy). In the period under review, many countries substantially reformed their competition laws, including Albania (2010), Australia (2010), Kenya (2010), Mongolia (2010), Zambia (2010), Kyrgyzstan (2011), Malta (2011), Brazil (2012), Moldova (2012), Montenegro (2012), Ireland (2014) and Mexico (2014).

11. It should be noted that, in line with the request made by the fourteenth session of the Intergovernmental Group of Experts on Competition Law and Policy in its agreed conclusions, the secretariat is making available to the Seventh Review Conference a report on the role of competition policy in promoting sustainable and inclusive growth.[2] The report addresses the ways in which competition policy and law may contribute to sustainable and inclusive development and gives examples from the laws and policies of various countries.

12. Objective No. 3 – "to protect and promote social welfare in general and, in particular, the interests of consumers in both developed and developing countries" – is receiving increased attention in many countries worldwide. Reflecting this, the Sixth

[2] TD/RBP/CONF.8/6.

Review Conference decided that UNCTAD should respond to calls from member States to undertake consultations on a revision of the United Nations Guidelines on Consumer Protection. The first Ad Hoc Expert Group Meeting on Consumer Protection, held in July 2012, requested that UNCTAD prepare an implementation report on the Guidelines. This report concluded that, since 1985, the Guidelines have been widely implemented by Member States of the United Nations.[3] National contributions (over 50) to this implementation assessment showed that all areas of the current Guidelines remained valid and useful. In addition, new challenges to consumer protection were identified, namely e-commerce and financial services, and there was interest in additional issues that merited wider consultations and the implementation and monitoring of the Guidelines.

13. The second Ad Hoc Expert Group Meeting on Consumer Protection, held in July 2013, reviewed the implementation report. During the discussions, several areas were identified for incorporation in any future revision, particularly areas where substantive progress has already been made by other organizations, such as the Organization for Economic Cooperation and Development and the Group of 20, and where substantial consensus among Member States of the United Nations has already been achieved. The following two areas were identified in particular: e-commerce (Organization for Economic Cooperation and Development Guidelines for Consumer Protection in the Context of Electronic Commerce (1999), currently under revision (due in 2016)); and financial services (Group of 20 High-level Principles on Financial Consumer Protection (2012)). The meeting also identified a range of other issues that would merit further discussion before inclusion in any revision, namely data protection, abusive advertising, cross-border trade, public services, access to knowledge, collective redress mechanisms, tourism, energy, transport and housing. Finally, many experts also called for an implementation and control mechanism for the United Nations Guidelines on Consumer Protection.

14. As a framework to explore these issues, a proposal was accepted to establish four working groups on the following themes: e-commerce (chaired by France); financial services (chaired by Malaysia); implementation of the United Nations Guidelines on Consumer Protection (chaired by Gabon); and other issues (chaired by Brazil and Germany). The second Ad Hoc Expert Group Meeting further agreed that the secretariat would prepare a report on these issues to be submitted to the Seventh Review Conference for inclusion in a possible future revision of the United Nations Guidelines on Consumer Protection, in close collaboration with the chairs of the working groups.

15. In collaboration with the chairs of the four working groups, the Chair of the second Ad Hoc Expert Group Meeting (France) and the Coordinator of the Working Groups (Portugal), the secretariat prepared questionnaires for each working group, which were then disseminated in order to solicit views, concerns, best practices and recommendations from member States and other relevant stakeholders. The responses to the questionnaires formed the basis of a report on modalities for the revision of the United Nations Guidelines for Consumer Protection, which outlined findings and trends and highlighted key issues as expressed by member States and relevant stakeholders. Throughout 2013 and 2014, UNCTAD undertook regional consultations on the margins of regional gatherings of consumer protection experts in Colombia, the Dominican Republic, France, Mexico, Panama, Sweden, Switzerland, Thailand and Tunisia.

16. The report on modalities for the revision of the United Nations Guidelines on Consumer Protection served as the basis for discussions at the third Ad Hoc Expert Group Meeting on Consumer Protection, held in January 2015. Participants held detailed discussions on a draft resolution, and consultations on the draft continued with all

[3] TD/B/C.I/CLP/23.

stakeholders at various meetings in the following months, in preparation for submission of the draft resolution to the Seventh Review Conference.

B. The development dimension

17. Section C of the Set, on multilaterally agreed equitable principles for the control of restrictive business practices, recognizes the possibility for national legislation to exclude certain sectors from the scope of national competition law (paragraph 6) and provides for "preferential or differential treatment for developing countries" in order that States take into account the "development, financial and trade needs of developing countries, in particular of the least developed countries, for the purposes especially of developing countries in: (a) Promoting the establishment or development of domestic industries and the economic development of other sectors of the economy; and (b) Encouraging their economic development through regional or global arrangements among developing countries" (paragraph 7).

18. In the long term, full competition is essential for the competitiveness of firms and industries. There has been widespread adoption of reforms promoting competition in developing countries and countries with economies in transition. In recent years, there has been substantial convergence in the competition policies followed by different countries, although there remain substantial differences between them.

19. A degree of flexibility for countries newly opening their markets is therefore fully in line with this provision of the Set. Developing countries concerned with the risk of eliminating local industry as a result of the sudden opening of specific markets to strong competition should therefore be in a position to take a more flexible, gradualist approach in order to ensure that liberalization takes place when their industries are more efficient and able to compete. It is not in the interest of countries to keep afloat industries that are never going to be viable without protection and subsidies, thus distorting the allocation of scarce resources.

20. In 2010, UNCTAD created the Research Partnership Platform, an initiative that aims at contributing to the development of best practices in the formulation and effective enforcement of competition and consumer protection laws and policies so as to promote development. The partnership brings together research institutions, universities, competition authorities, business and civil society, providing a platform where they can undertake joint research and other activities with UNCTAD, disseminate the results of their own work and exchange ideas on issues and challenges in the areas of competition and consumer protection, particularly those faced by developing countries and countries with economies in transition. The role of UNCTAD is to facilitate and provide guidance on research and analysis and other activities to be undertaken by members of the platform. UNCTAD benefits from the research findings when responding to the challenges faced by developing countries through its technical assistance and capacity-building activities.

21. The first meeting of the Research Partnership Platform in 2010 included 10 participants, while the fifth meeting in 2014 involved close to 100 participants. The fifth meeting also saw the launch of the UNCTAD Research Partnership Platform publication series.[4] The Platform currently hosts as partners over sixty institutions, consisting of research institutes, universities, non-governmental organizations, corporate affiliates and

[4] UNCTAD, 2014, *Competitive neutrality and its application in selected developing countries* (Geneva, United Nations publication), available at http://unctad.org/en/PublicationsLibrary/ditcclpmisc2014d1_en.pdf.

competition agencies. The next step in the evolution of the Platform is to capture sources of funding in order to cater for its rapid expansion and fulfil the entirety of its mandate, including the joint organization of conferences and seminars, the joint organization of training courses and workshops in developing countries where UNCTAD conducts capacity-building projects and the joint design of training modules and pedagogical materials on specific topics related to competition and consumer protection.

22. The interface between competition and development policies has been a perennial topic for the Intergovernmental Group of Experts on Competition Law and Policy. The Group considered certain aspects of the interface including, in 2012, cross-border anticompetitive practices and the challenges for developing countries and countries with economies in transition and, in 2013, the impact of cartels on the poor. In addition, UNCTAD issued publications in the period 2011–2014 with a focus on this interface, including on competition in the economy of Cameroon, competition issues in the transport sector in Lesotho, competition issues in the tobacco industry of Malawi and competition issues in the economy of Mozambique, as well as the first publication in the UNCTAD Research Partnership Platform publication series (see http://unctad.org/en/Pages/DITC/CompetitionLaw/Competition-Law-and-Policy.aspx).

23. In July 2014, preceding the fourteenth session of the Intergovernmental Group of Experts on Competition Law and Policy, UNCTAD organized an Ad Hoc Expert Meeting on the Role of Competition Law and Policy in Fostering Sustainable Development and Trade through the Enhancement of Domestic and International Competitiveness of Developing Countries. In consideration of the fact that growth and development depends on efforts carried out in many different fields and that there are close linkages between competition, trade, intellectual property and improved governance policies, UNCTAD invited officials from the Organization for Economic Cooperation and Development, World Intellectual Property Organization and World Trade Organization to discuss issues including innovation, competitive neutrality, improved governance policies, trade liberalization, global value chains and intellectual property rights.

C. The main anticompetitive practices

24. Section D of the Set, on Principles and Rules for enterprises, including transnational corporations, contains the core anticompetitive practices that should be refrained from by enterprises "engaged on the market in rival or potentially rival activities" when "through an abuse or acquisition and abuse of a dominant position of market power, they limit access to markets or otherwise unduly restrain competition" (paragraphs 3 and 4). The treatment of horizontal and vertical restraints, as well as dominance and abuse of dominant market power, is further elaborated in the model law on competition prepared by UNCTAD. In line with the request of the Sixth Review Conference, the commentary to the model law is being revised periodically in light of legislative developments and comments made by member States for consideration by subsequent sessions of the Intergovernmental Group of Experts on Competition Law and Policy and Review Conferences. In this context, revisions to chapters I, IV, VIII, XI and XIII of the model law have been submitted to the Seventh Review Conference.

25. Section E of the Set, on Principles and Rules for States at National, Regional and Subregional levels, and Section F, on international measures, complement each other, as Section E states that "States should, at the national level or through regional groupings, adopt, improve and effectively enforce appropriate legislation and implementing judicial and administrative procedures" (paragraph 1). The provisions calling for exchanges of information and cooperation in Section E are complemented by those in Section F, which calls for "work aimed at achieving common approaches" (paragraph 1), consultations

among States (paragraph 4), continued work by UNCTAD on the elaboration of a model law or laws (paragraph 5) and technical assistance and advisory and training programmes (paragraph 6).

D. Efforts made by member States and regional groupings

26. As indicated in the introduction, in the period since the Sixth Review Conference, there has been considerable interest on the part of developing and least developed countries in drafting national competition laws. Seven countries adopted new competition laws and more than 12 countries reformed existing legislation in the period under review. Many more are preparing domestic legislation.

27. At the regional level, some groupings have begun to implement regional competition rules and/or engage in cooperation agreements for more effective competition law enforcement. Common approaches and the harmonization of legislation are on the increase, largely as a result of constructive exchanges of experiences and consultations that take place in bilateral, regional and multilateral forums, such as the International Competition Network, Intergovernmental Group of Experts on Competition Law and Policy and Organization for Economic Cooperation and Development. The regional enforcement of competition policy in Central America is considered in the box.

Towards a mechanism for regional enforcement of competition policy in Central America

Under the regional component of the second phase of the technical assistance programme on competition and consumer protection policies for Latin America (COMPAL), UNCTAD prepared a study on the regional enforcement of competition policy in Central America, covering Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama. The study focuses on competition problems in three selected economic sectors in the region, namely banking, medicinal drugs and international passenger air transport. For each of these sectors, the study determines that a coordinated effort by the region's competition authorities would provide many advantages over the isolated efforts of each national competition authority. Based on these findings, the study proposes that cooperation between the region's competition authorities be strengthened.

The study identifies some regulatory problems in the banking sector that may block market entry by potential new competitors or limit the ability of some to compete with others by imposing discriminatory treatment. Specific structural weaknesses (lack of market development and related financial instruments or alternative technologies) that could restrict the contestability of the markets in which commercial banks operate are also identified. The work of competition authorities in this sector is essential in advocating for regulatory changes to improve competitive conditions and prevent anticompetitive practices.

In the pharmaceutical sector, specific national regulations concerning the authorization of drugs or drug production and distribution, and others that restrict activities or limit parallel imports and intraregional trade in generic drugs, may limit competition in these markets. With respect to public procurement, the study notes that direct purchase abuse should be prevented, truly competitive tenders should be promoted (joint price negotiating in the Central American region is a good initiative) and the necessary mechanisms be put in place for detecting bid-rigging practices. In addition, competition authorities need to take action against anticompetitive practices in the form of price fixing or market-sharing agreements, exclusivity contracts in vertical relationships and practices such as bundled pricing, predatory behaviour and loyalty discounts by companies with market power.

In the passenger air transport sector, international air fares between Central American countries are too high for most of the population, significantly impacting the ability of people to move around the region. The study emphasizes that sector is clearly dominated by two major companies, which operate routes between the region's cities as a monopoly or duopoly. Although the problem may partially be structural, regulations and administrative practices tend to protect the installed operators against potential entrants. Moreover, airports – essential facilities for the activity – require investment for expanding and modernizing, along with clear, pro-competitive policies for allocating existing capacity. Other types of entry barriers may arise through the strategic behaviour of incumbent operators. The study determines that competition authorities need to pay special attention to agreements between airlines or between airlines and travel agencies.

In all three sectors, competition authorities need to review mergers and acquisitions that might be harmful for competition.

The competition-related problems identified by the study in each sector and the remedies proposed for resolving them require joint and coordinated efforts by national competition authorities. Regional cooperation on competition issues therefore needs to be strengthened. The study recommends a mechanism for regional enforcement of competition policy that comprises national authorities, in order to take advantage of their knowledge and experience. A set of regional rules and regulations needs to be developed for establishing the necessary coordination mechanisms. The model proposes that national competition authorities in the region jointly address competition problems with a regional scope, and could improve the efficacy and efficiency of the work of authorities to the benefit of Central American consumers and be adopted in a relatively short period of time with limited financial resources.

Source: UNCTAD, forthcoming, *Towards a Mechanism for Regional Enforcement of Competition Policy in Central America*.

E. Substantive discussions of the Intergovernmental Group of Experts on Competition Law and Policy

28. The round table consultations that take place annually during sessions of the Intergovernmental Group of Experts on Competition Law and Policy have become an appreciated feature of UNCTAD's intergovernmental machinery. This function of the Intergovernmental Group of Experts was decided by the Third Review Conference, held in 1990 (paragraph 9 of the resolution adopted by the Review Conference). In the period under review, the Intergovernmental Group of Experts held round tables on the following issues:

(a) Foundations of an effective competition agency;

(b) The importance of coherence between competition policies and government policies;

(c) Competition policy and public procurement;

(d) Cross-border anticompetitive practices: The challenges for developing countries and countries with economies in transition;

(e) Effectiveness, capacity-building and technical assistance extended to young competition agencies: Needs and challenges related to human resources and knowledge management;

(f) Knowledge and human resource management for effective enforcement of competition law;

(g) Prioritization and resource allocation as a tool for agency effectiveness;

(h) Modalities and procedures for international cooperation in competition cases involving more than one country;

(i) The impact of cartels on the poor;

(j) Capacity-building and UNCTAD voluntary peer reviews as a capacity-building tool;

(k) The benefit of competition law for consumers;

(l) Informal cooperation among competition agencies on specific issues;

(m) Communication strategies of competition authorities as a tool for agency effectiveness;

(n) UNCTAD capacity-building activities on competition law and policy.

29. The conclusions of consultations among experts during the meetings of the Intergovernmental Group of Experts on Competition Law and Policy are recorded in the reports of the meetings, and are disseminated by UNCTAD through capacity-building activities in the field and reflected in the reports of voluntary peer reviews of competition law and policy.

F. Technical assistance

30. Despite a general widespread trend towards the adoption, reformulation and better implementation of competition and consumer protection laws and policies in developing countries and countries with economies in transition, many of these countries still do not have up-to-date competition and consumer protection legislation or adequate institutions for their effective enforcement, and rely to a large extent on UNCTAD capacity-building. In this regard, UNCTAD provides capacity-building and technical assistance on competition law and policy at national and regional levels.

31. At national levels, UNCTAD, with the support of donor countries, has assisted developing countries from all regions of the world, including a number of least developed countries, in designing and formulating their competition and consumer protection policies and legislation, setting up their competition agencies, raising public awareness of the benefits of competition law and policy and contributing to the creation of a competition culture.

32. At regional levels, UNCTAD assists in drafting and the implementation of regional competition and consumer protection legislation, developing frameworks for cooperation in competition law enforcement and organizes conferences, seminars and workshops for different beneficiaries, including judiciary and academia, aimed at contributing to capacity-building and regional cooperation in the area of competition.

33. UNCTAD extends capacity-building and technical assistance in the area of competition and consumer protection policy on request from countries and regional groupings based on their needs and resources available, including the following activities:

(a) Drafting competition and consumer protection policies, laws, regulations and implementation guidelines for countries or regional organizations;

(b) Assisting countries or regional organizations in revising their competition and consumer protection legislation based on best international practices;

(c) Providing advisory services for setting up or strengthening competition authorities;

(d) Training competition and consumer protection officials and competition case handlers;

(e) Organizing seminars on competition law for judiciary;

(f) Conducting studies on competition issues in certain sectors;

(g) Organizing advocacy workshops and seminars on competition and consumer protection issues;

(h) Facilitating voluntary peer reviews of the competition laws and policies of interested countries.

34. The direct beneficiaries of UNCTAD technical assistance programmes include government officials responsible for implementing competition and consumer protection laws and policies, officials of other relevant government bodies and sector regulators, the judiciary, business, consumer associations and academia.

35. UNCTAD capacity-building and training activities increased considerably in the period under review. This was due in part to the considerable interest demonstrated by member States, at both national and regional levels, as well as to the solidarity demonstrated by donors from many countries who made generous financial contributions and contributions in kind.

36. COMPAL is supported by the State Secretariat for Economic Affairs of Switzerland (see http://programacompal.org). Five Latin American beneficiary countries, namely the Plurinational State of Bolivia, Costa Rica, El Salvador, Nicaragua and Peru, benefited from this programme during its first phase (2005–2008). Under its second phase, COMPAL II (2009–2013), the number of beneficiary countries increased to 10, including Colombia, the Dominican Republic, Ecuador, Paraguay and Uruguay. Guatemala and Honduras participated in regional component activities of the programme using their own resources. COMPAL II created a well-functioning peer-learning process and a platform for regional cooperation, including the creation of an Advisory Group of Experts, a collegial body comprising former heads of competition and consumer protection agencies in the Latin American region. Following the successful implementation and impact of the first two phases, COMPAL III, initiated in early 2015, involves three additional countries, namely Argentina, Chile and Mexico.

37. In addition, in order to streamline the technical assistance activities of UNCTAD and increase their impact, a Global COMPAL strategy was launched by the Secretary-General of UNCTAD in 2014.[5] Following its adoption, the strategy was extended to countries in the Middle East and North Africa. The extension of the programme is funded by the Swedish International Development Cooperation Agency for an initial period of four years (2015–2019), and focuses on regional integration through the design and enforcement of competition and consumer rules as tools for inclusive and sustainable economic growth. The programme aims to enhance the capacities of countries in the Middle East and North Africa to adopt and implement effective competition and consumer policies, provide assistance to the private sector in order to create a competition culture without unnecessary bureaucratic burdens, develop a regional strategy to assist countries in the Middle East and North Africa in adopting competition neutrality frameworks and enforcing associated policies, respond to the specific needs and circumstances of different countries with tailored policy advice and capacity-building activities and effectively facilitate the ascension of new members to Global COMPAL. The beneficiaries are Algeria, Egypt, Lebanon, Jordan, Morocco, the State of Palestine, Tunisia and Yemen.

[5] For more information about the strategy, see TD/RBP/CONF.8/7.

38. As a follow-up to the peer review of the West African Economic and Monetary Union conducted in 2007, a memorandum of understanding was signed between UNCTAD and the Union in 2011 to implement the recommendations of the peer review. The Commission of the West African Economic and Monetary Union agreed to make a financial contribution to this three-year project. Since 2012, many activities have been carried out to facilitate the implementation of the competition rules of the Union by member States, including raising awareness of officials and the public on the benefits of competition, training competition officials, adapting the legislation of member States and adopting procedures at national and regional levels for effective implementation of community competition rules and reorganizing national competition institutions.

39. In addition, UNCTAD is implementing a technical assistance and capacity-building project for Zimbabwe to strengthen its competition regime, funded by the European Union and incorporated in its wider Trade and Private Sector Development Project. UNCTAD has recently begun working with the competition authority of Ethiopia in a capacity-building programme funded by Luxembourg. UNCTAD has also received requests from countries in the Middle East and will start a technical assistance and capacity-building programme in Qatar.

G. Voluntary peer reviews

40. UNCTAD launched its voluntary peer reviews of competition law and policy in 2005. The voluntary peer reviews are dedicated to enhancing the quality and effectiveness of the competition policy enforcement framework in member States, and involve the scrutiny of competition policy as embodied in competition law and consider the effectiveness of institutions and institutional arrangements in enforcing this law.

41. Since the Sixth Review Conference, voluntary peer reviews have been undertaken for 14 countries, namely Serbia (2011), Mongolia (2012), a tripartite peer review for the United Republic of Tanzania, Zambia and Zimbabwe (2012), Nicaragua (2013), Pakistan (2013), Ukraine (2013), Namibia (2014), the Philippines (2014), Seychelles (2014), Albania (2015), Fiji (2015) and Papua New Guinea (2015).

42. Beginning in 2005, the methodology used for evaluation of an authority involved conduct of a self-assessment system and the simultaneous selection of one or two independent experts to prepare an independent report based on the answers from questionnaires sent to authorities, analysis of the legal and institutional frameworks and interviews conducted with relevant officials in the country. This approach has evolved to include other forms of assessment, in order to provide more analytical elements that help focus on more unorthodox forms of the issues detected in State policies.

43. In 2012, UNCTAD first implemented a tripartite peer review covering three neighbouring countries, namely the United Republic of Tanzania, Zambia and Zimbabwe, using a different, more complex methodology whereby the countries did not perform a self-assessment but instead undertook mutual evaluations (each authority reviewed competition law and enforcement in one of the two neighbouring States). These national evaluations were supplemented by a comparative assessment report by an independent expert. The objectives of this new methodology were to provide greater insights and to seek synergies and solutions across competition systems in countries that are members of common regional arrangements and have close trade and economic relations.

44. Due to the success of the work carried out through the voluntary peer review process, requests have been received from member States for UNCTAD to expand this process to cover consumer protection issues. In response, UNCTAD will launch voluntary peer reviews of consumer protection law and policy in 2015. These reviews will scrutinize

consumer protection policy as embodied in law and consider the effectiveness of institutions and institutional arrangements in enforcing consumer protection law. Mexico has been accepted as the first member State to undergo this type of voluntary peer review.

45. With regard to a perspective of continuous improvement, UNCTAD has commissioned a report to evaluate the methodology and output of the peer review process over its 10-year existence. This report will be prepared by a number of independent experts, including individuals that have worked as independent experts on peer reviews, or heads of previously reviewed agencies. The strengths and weaknesses highlighted in the report will lead to specific recommendations for the further evolution of the voluntary peer review process, enabling future work by UNCTAD to be both of higher quality and more effective.

II. International cooperation

46. Cooperation in dealing with restrictive business practices is among the international measures provided for in the Set. The Sixth Review Conference decided that future sessions of the Intergovernmental Group of Experts on Competition Law and Policy should include international cooperation and networking as one of the four clusters of issues for informal consultations among participants on competition law and policy. It invited Governments, during future consultations in meetings of the Intergovernmental Group of Experts, to clarify the scope or application of their competition laws and policies, with a view to improving mutual understanding about substantive principles and procedures of competition law and policy. In the context of this exercise, Governments may wish to discuss the following: how the Set might be better implemented, particularly those provisions which have not been adequately implemented to date; techniques and procedures for detecting and sanctioning collusive tendering, including international cartels and other anticompetitive practices; and strengthening of information exchanges, consultations and cooperation in enforcement at the bilateral and regional levels, including subregional groupings.

47. Cooperation among competition agencies is an essential tool to address anticompetitive practices in the global economy. Communication among competition agencies throughout the world has improved considerably. Agencies have been employing various tools, ranging from formal agreements to informal communications to cooperate with each other.

48. First-generation bilateral agreements allowing exchange of information emerged first between developed countries, such as the Mutual Antitrust Enforcement Assistance Agreement (1999), between Australia and the United States of America. Cooperation under these agreements involves extensive reciprocal enforcement assistance between the parties, including exchanging confidential information subject to the consent of the investigated parties, taking individual testimonies and executing searches and seizures.

49. Second-generation agreements go beyond the previous ones in sharing confidential information. The first such agreement was signed between the European Union and Switzerland, and will take effect subject to approval by the European Parliament and the Swiss Parliament. This agreement allows parties, on request, to transmit confidential information for use as evidence, subject to certain safeguards, and even without the consent of the investigated party.

50. Most cooperation agreements limit the exchange of information to non-confidential information. This may be a significant drawback, especially in dealing with cross-border cartel cases, where confidential information located in a foreign jurisdiction may be pivotal to the success of enforcement.

51. Given the difficulties in engaging in formal cooperation arrangements, there has been an increase in informal cooperation in international cartel cases and mergers over the past decade. The tools for informal cooperation include bilateral memorandums of understanding, informal networking forums (e.g. the African Competition Forum and Euro-Mediterranean Competition Forum) and exchange of non-confidential case information. The European Commission has cooperated with other agencies in approximately 31 per cent of cartel investigations.[6] An UNCTAD study indicates that informal cooperation among competition authorities should not be underestimated.[7] If developing countries have no leniency programmes or formal cooperation agreements with other countries, informal cooperation may prove very effective in international cartel investigations. The study suggests that facilitating the exchange of publicly available information through an intelligence network would be beneficial for all participants, especially authorities in developing countries. The intelligence network may set up a system of alerts to inform competition authorities about cartels that have been successfully prosecuted, including techniques of detection and evidence gathering. Another idea is to establish an international data bank containing a list of all cartel members or businesses involved in serious and repetitive violations. Such schemes would ensure the continuity of international efforts to prosecute cartels and send a strong signal that cartels may be investigated and sanctioned in other jurisdictions.

52. With regard to mergers, the importance of cooperation in regulating cross-border mergers has been stressed by both developed and developing countries. The worldwide proliferation of merger control regimes has the advantage of improved monitoring of merger activities. However, without cooperation and coordination between competition agencies, there are significant drawbacks to this development, from a business perspective (additional complexity, legal uncertainty and differences in timing and costs) and from a competition authority perspective (inconsistent or conflicting decisions). Convergence between merger control regimes has therefore been encouraged by the International Competition Network (see for example the Recommended Practices for Merger Notification Procedures, available at http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf).

53. Cooperation in cross-border mergers may occur at multilateral, regional and bilateral levels and may be facilitated by competition provisions in regional or bilateral arrangements or be done on an informal case-by-case basis. Some countries have stressed the need for cooperation in cross-border mergers, particularly with respect to the assessment of appropriate remedies, and stated that they have found informal cooperation more useful in the selection and design of remedies than formal agreements and memorandums of understanding.[8] Informal cooperation may provide opportunities for exchanging experiences on methodologies and tools for estimating the effects of and potential risks that may arise from a merger and seeking advice on remedies that have been successfully implemented in similar cases in other countries and those which should be avoided.

54. Combining enforcement efforts at the regional level is another strategy to deal with the cross-border effects of anticompetitive practices in a region. This may facilitate more efficient and effective enforcement against such anticompetitive behaviour. An innovation in this direction is the Lima Declaration, signed by the heads of the three competition authorities of Colombia, Chile and Peru and UNCTAD in 2013. This instrument for informal cooperation aims to create a platform for exchanging experiences and training

[6] TD/B/C.I/CLP/10.
[7] TD/B/C.I/CLP/16.
[8] Ibid.

among the three agencies and conducting studies on topics of common interest. This cooperation framework has been used in a common investigation and regular trilateral and bilateral meetings have been held among the agencies.

55. Encouraging progress has been made in other regional groupings. Member States of the Association of South-East Asian Nations have committed to introducing national competition policy and law by 2015. The Competition Commission of the Common Market for Eastern and Southern Africa became operational in 2013 and began reviewing mergers affecting multiple jurisdictions in the region. The Southern African Development Community commits its member States to pursuing case-specific cooperation to the extent consistent with each member's laws, regulations and important common interests in preventing hard-core cartels, abuse of dominance, anticompetitive mergers and unilateral conduct and, for this purpose, launched an online data bank in 2012 to exchange non-confidential information on ongoing and closed competition cases.

56. The success of the European Competition Network suggests possible useful elements for other regional groups. More importantly, it highlights how the harmonization of substantive rules is necessary, but not sufficient, to reduce regulatory burdens and uncertainty. Procedural rules and domestic legal structures also play an important role.

57. UNCTAD, through its voluntary peer review process, has contributed to informal cooperation efforts among competition agencies, including cross pollination between young and mature competition agencies. One appreciated and innovative feature of voluntary peer reviews is the review of regional competition arrangements, such as those of the West African Economic and Monetary Union and its member States and the tripartite review for the United Republic of Tanzania, Zambia and Zimbabwe. The two reports and their respective recommendations highlighted appropriate areas where inter-agency cooperation may be the most useful and proposed reforms and the adoption of best practices.[9]

58. Two other cooperation initiatives launched by UNCTAD are the UNCTAD and Latin American and Caribbean Economic System Working Group on Trade and Competition established in 2008 and, most recently, the UNCTAD Collaborative Information Platform, launched in July 2013.[10] The working group is comprised of trade and competition experts from 25 countries in Latin America and the Caribbean. It focuses on the exchange of information, experiences and best practices in order to enhance cooperation efforts in dealing with trade and competition issues. The platform is an online database for competition cases, which allows competition agencies to post and access information on cases handled by other agencies. National competition authorities may then use this information to handle similar cases in their jurisdictions. In this way, the platform may facilitate collaboration in ongoing investigations.[11]

59. Nonetheless, there is still work to be done in order for young competition agencies or those of small or developing economies to benefit from cooperation. Many of these agencies are not party to effective formal bilateral or regional agreements. Most bilateral agreements are between developed countries. One reason for this is that developed countries focus on economies whose commercial activities are likely to impact their markets. Businesses from smaller economies are less likely to have such international reach. Limitations to cooperation also arise from differences in competition laws, procedures, legal regimes and efficiencies of court systems, as well as from insufficient mutual trust and understanding. Resource and capacity constraints faced by competition

[9] TD/B/C.I/CLP/21.

[10] A Ezrachi and H Qaqaya, 2012, UNCTAD's Collaborative Information Platform, *Concurrences Competition Law Journal*, 4:204-207.

[11] TD/B/C.I/CLP/29.

authorities in developing countries are another factor in restricting cooperation possibilities with their counterparts, especially in developed countries. The benefits to more advanced jurisdictions of entering into bilateral agreements with their counterparts in developing countries may not be immediate, but in the long term, the harmonization of competition law and policy that may result from repeated interactions may benefit both jurisdictions.

60. Recent cooperation agreements between advanced and emerging economies indicate that cooperation is an evolutionary process, which involves the gradual adaptation of rules and procedures and mutual trust. Informal cooperation through capacity-building and exchanges of knowledge and experiences can play an important role in upgrading skills and closing the gap between competition agencies. It is this gap in technical capacity, legal regimes and mutual trust that requires attention if cooperation in the area of competition policy is to be enhanced and expanded.

61. UNCTAD studies suggest the following steps for moving forward in international cooperation:[12]

(a) Promoting better understanding of each other's laws, assessment criteria and designs of remedies and sanctions;

(b) Building the human and technical capacities of young competition agencies to enforce competition law;

(c) Developing guidelines and best practices for cooperation agreements based on what works well and what does not work;

(d) Exchanging staff and detaching resident advisors to promote mutual understanding and trust;

(e) Promoting transparency in procedures, processes and design;

(f) Assuring the inclusion of provisions in national laws allowing for cooperation and for exchanges of information for enforcement purposes;

(g) Establishing and implementing clear safeguards for due process and the protection of confidential information.

62. The existing regional frameworks could be used to promote and facilitate international cooperation in competition law enforcement. This is in line with the Set, which provides for the establishment of appropriate mechanisms at regional and subregional levels to promote exchanges of information on anticompetitive practices and on the application of national laws and policies in this area, as well as to provide mutual assistance in anticompetitive practices control (article E.7). It is also in line with the Accra Accord, which provides that UNCTAD should continue analytical work and capacity-building activities to assist developing countries on issues related to competition law and policy, including at a regional level (paragraph 104). In this context, UNCTAD is increasingly engaged in capacity-building activities not only at national but also at the subregional and regional levels. A report to the Seventh Review Conference lists capacity-building efforts by UNCTAD in the last five years.[13]

[12] Ibid and TD/B/C.I/CLP/21.

[13] TD/RBP/CONF.8/7.

III. Outlook for the Seventh Review Conference

63. On the basis of the above developments, the Seventh Review Conference may wish to reflect on possible topics in the area of competition and consumer policies that UNCTAD should focus on in the next five years, taking into account the guidance set out in paragraphs 8 and 11 of the resolution adopted by the Sixth Review Conference, and items covered in the meetings of the Intergovernmental Group of Experts on Competition Law and Policy held in the period under review.

64. Member States may wish to determine the specific topics to be covered in the period leading to the Eighth Review Conference in 2020, in light of how such topics fit under the following broad categories: appropriate design and enforcement of competition law and policy; international cooperation and networking; cost-effectiveness, complementarity and collaboration in the provision of capacity-building and technical assistance to interested countries; consultations on and revision of the model law; issues related to cases concerning anticompetitive practices and other issues relevant to competition that have been raised by member States; and issues in the extension of competition and consumer policy to new areas such as emerging markets for social services traditionally provided by Governments and the appropriate design and institutional framework for their application. It would also be appropriate to take into account current trends and issues in both competition policy and international trade and development trends.

65. Taking into account the above, member States may wish to consider the following in determining possible topics to be covered by meetings of the Intergovernmental Group of Experts on Competition Law and Policy over the next five years:

(a) Considering the broader development context, that is, the United Nations summit for adoption of the post-2015 development agenda, to be held in September 2015, it would be relevant for UNCTAD to look into the role of competition law and policy in achieving sustainable and inclusive growth and, specifically, the role of competition policy with respect to attainment of sustainable development goals (for the proposal currently under consideration, see https://sustainabledevelopment.un.org/focussdgs.html).

(b) Recognizing the increasing trend towards inclusion of competition policy provisions in regional trade agreements and implications of cross-border anticompetitive practices for intraregional and international trade, it would be useful to look into ways in which national competition and regulatory policies could help implement such provisions and foster competition at regional and international levels.

(c) Recognizing the role of effective competition agencies in dealing with anticompetitive practices, it would be important to re-emphasize the work of UNCTAD on appropriate institutional structures and working methods to improve agency effectiveness in competition law enforcement while adhering to procedural fairness.

(d) Considering the increasingly cross-border nature of anticompetitive practices due to globalization, continued support by UNCTAD for appropriate competition law enforcement by national competition authorities and cooperation between them in such enforcement remains crucial in dealing with anticompetitive practices of this nature.

(e) Many developing countries have adopted competition and consumer laws and set up relevant institutions in the past decade. Recognizing the increased number of young competition and consumer protection agencies, the work of UNCTAD on technical assistance and capacity-building in the area of competition and consumer protection continues to be relevant and crucial for developing and least developed countries and countries with economies in transition.

(f) Considering the success of the Ad Hoc Expert Group Meetings on issues related to the interface between competition and consumer protection, competition and sustainable development and revision of the United Nations Guidelines on Consumer Protection, as well as the interest shown in ensuing consultations for the creation of an Intergovernmental Group of Experts on Consumer Protection Law and Policy in UNCTAD, and therefore establishing yearly Ad Hoc Expert Group Meetings on consumer protection until the eventual establishment of such a body.

(g) Acknowledging research and policy analysis as a main pillar through which UNCTAD supports member States and the growth of the UNCTAD Research Partnership Platform since the last Review Conference, and therefore providing support for the platform to expand its activities towards stakeholder conferences and seminars and training courses and workshops in developing countries, in light of the issues faced by these countries and ongoing work by UNCTAD on competition policy.

(h) Recognizing the need for increased cooperation between international bodies and networks that address competition law and policy and interfacing issues remains important.